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In the Supreme Court of the United States

SUSAN TAVE ZELMAN, SUPERINTENDENT OF OHIO, ET AL., PETITIONERS

v.

DORIS SIMMONS-HARRIS, ET AL., RESPONDENTS.

HANNA PERKINS SCHOOL, ET AL., PETITIONERS

v.

DORIS SIMMONS-HARRIS, ET AL., RESPONDENTS.

SENEL TAYLOR, ET AL., PETITIONERS

v.

DORIS SIMMONS-HARRIS, ET AL., RESPONDENTS.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF FOR CLEVELAND CITY COUNCILWOMAN FANNIE LEWIS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

MARK R. LEVIN
RICHARD P. HUTCHISON
MICHAEL J. O'NEILL
MYLES A. PERRY
Landmark Legal Foundation
3100 Broadway, Suite 1110
Kansas City, Missouri 64111
(816) 931-5559

STEFFEN N. JOHNSON
Counsel of Record
STEPHEN M. SHAPIRO
ROBERT M. DOW, JR.
DAVID W. FULLER
Mayer, Brown & Platt
190 South La Salle Street
Chicago, Illinois 60603
(312) 782-0600

Counsel for Amicus Curiae

QUESTION PRESENTED

Whether the Establishment Clause permits a State to enact an educational program for the benefit of low-income children in its most economically depressed city, under which eligible children are provided scholarships to attend the school of their choice, whether it is public or private, secular or religious.

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amicus curiae Fannie Lewis is a Democratic City Councilwoman representing Cleveland's seventh ward ("Ward 7"), a position to which she was first elected more than 20 years ago.[1] Ward 7 comprises core inner-city neighborhoods and is populated by some of the poorest people in the United States. More than 40 percent of Cleveland's residents—and more than 70 percent of the residents of Ward 7—live in poverty. Seventy percent of the students in the City's schools are on Aid to Families with Dependent Children. For many of these children, the chance to attend a private school represents the only hope for breaking out of the poverty cycle in which they are trapped.

Indeed, it is hard to overstate the dire condition of the public schools in Cleveland. The school district meets none of the State's 27 minimum performance standards, and a federal court has ordered a state-level takeover of district schools because of "emergency" conditions resulting from local mismanagement. *Reed* v. *Rhodes*, 934 F. Supp. 1533, 1539 (N.D. Ohio 1996). Despite per-pupil outlays of roughly $7,000—twice the state average, and well above the national average—more than two-thirds of the district's students drop or flunk out before their graduation. Those who do graduate, moreover, read, write, and compute at levels well below their counterparts in other cities. Because they lack the finances to pay for any alternative, however, most inner-city Cleveland residents have no choice but to send their children to the City's troubled public schools.

Not surprisingly, Cleveland's school dropout rates are linked to high rates of unemployment, drug and alcohol abuse, teen pregnancy, welfare dependency, infant mortality, and crime. These problems are especially pronounced for racial minorities

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[1] This brief was not authored in whole or in part by counsel for any party, and no person or entity other than the *amicus curiae* and her counsel made a monetary contribution to the brief's preparation or submission. The parties' written consents to the filing of this brief have been lodged with the Clerk.

living in Ward 7. For example, more than 55 percent of black men living in Cleveland are unemployed.

The condition of Cleveland's schools has long been a matter of concern to Councilwoman Lewis. She has been active in the Cleveland public schools since 1951, when her children first enrolled there. She has witnessed first hand the construction and demolition of more than one dozen city schools, and she has seen these schools continue to deteriorate despite billions of dollars spent to rescue them. The failure of repeated efforts to reform the system from within led her to become involved with the Ohio Pilot Scholarship Program (the "Program"). In January 1995, concerned that members of the legislature were not accurately representing the views of inner-city residents—and especially African Americans—on the subject of school choice, she led several busloads of inner-city residents to Columbus to make known their views. This group—including more than 300 people of various races, political persuasions, and faiths—testified at committee hearings and appealed to every member of the legislature. As a result of these efforts, the Program soon became law.

For these reasons, Councilwoman Lewis has a vital interest in ensuring that the Program is not struck down on the basis of an incorrect interpretation of the Establishment Clause. And to those who decry the Program on the ground that it enables private schools to "cream off" the best students in Cleveland's schools, she has a simple response: "There's nobody left to cream off. Nearly every family that could leave the system did so long ago."

ARGUMENT

By the mid-1990s, it was apparent that the public schools in Cleveland—like those in many American cities—were in crisis. The State spends roughly $7,000 on each student in Cleveland, yet more than two-thirds of them fail to graduate. J.A. 56a; C.A. App. 1620-1621. Thus, with the active support of *amicus*

curiae Fannie Lewis, the legislature embarked on an ambitious experimental program to improve Cleveland's schools by introducing competition and parental choice.

There are substantial reasons both in educational theory and in the experience of other areas to believe that school choice will improve the performance not only of students who choose alternative schools, but of those who choose public schools, which are forced to compete. See LEARNING FROM SCHOOL CHOICE (Paul E. Peterson & Bryan C. Hassel eds., 1998). The question here, however, is not whether that prediction is correct —and if it is not, Fannie Lewis will be among the first to push for new measures—but whether it can be put to the test.

Unfortunately, feeling itself bound by a 1973 decision of this Court, which itself was based on a highly dubious reading of the Establishment Clause, the court below called a halt to Ohio's experiment in educational reform—and with it, the only chance many thousands of children in Cleveland have to attend quality schools. That decision, we submit, is a human tragedy. But more to the point, it was a legal mistake. The decision was based on two fallacies. The first is that schools that fail to separate the religious and secular aspects of education are ineligible for public support even under a neutral program. The second is that the Cleveland program is not genuinely neutral.

I. Evenhanded School Choice Programs Comport With The History And Purposes Of The First Amendment.

This Court's understanding of the Establishment Clause has changed dramatically over the years. *Mitchell* v. *Helms*, 530 U.S. 793, 845 (2000) (O'Connor, J., concurring). But the court below remained mired in the jurisprudence of the 1970s. It relied almost exclusively on *Committee for Public Education & Religious Liberty* v. *Nyquist*, 413 U.S. 756 (1973), despite the inconsistency between *Nyquist* and this Court's more recent decisions. It is possible to distinguish *Nyquist* from this case, as petitioners have shown. But the fundamental premise on which

Nyquist rested—that public assistance may not be provided to children who attend schools that do not separate the religious and secular aspects of education—was wrong from the start. It is inconsistent both with the fundamental principles of the First Amendment and with a long line of this Court's decisions.

The Religion Clauses of the First Amendment must be read in conjunction: the Establishment Clause precludes using state resources to favor or compel religious practice, while the Free Exercise Clause precludes using state authority to disfavor or prohibit it. As Justice Souter explained for the Court in *Board of Education of Kiryas Joel* v. *Grumet*, 512 U.S. 687, 696 (1994), "'A proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of "neutrality" toward religion,' favoring neither one religion over others nor religious adherents collectively over nonadherents" (citations omitted). The object of these constitutional provisions was not to create a more secular society, but to create a diverse and pluralistic society, where religious decisions are made by individuals, families, and private institutions. "The Religion Clauses prohibit the government from favoring religion, but they provide no warrant for discriminating against religion." *Id.* at 717 (O'Connor, J., concurring). Thus, "the guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse." *Rosenberger* v. *Rector of Univ. of Virginia*, 515 U.S. 819, 839 (1995).

We acknowledge that in our disestablishmentarian constitutional tradition, no one may be forced, through taxation or otherwise, to pay for religious activities. *Rosenberger*, 515 U.S. at 847 (O'Connor, J., concurring). But that principle is not implicated here. Respondents are being taxed to fund scholarships that benefit all eligible schoolchildren. That has a secular purpose and an effect that is entirely neutral toward religion. Respondents have no legitimate objection to

subsidizing tuition for poor children attending both public and nonpublic elementary and middle schools—any more than taxpayers had a legitimate objection to paying for seminary education in *Witters*, sign-language interpreters in *Zobrest*, textbooks in *Allen*, bus rides in *Everson*, remedial instruction in *Agostini*, computers in *Mitchell*, or standardized tests in *Wolman* and *Regan*. Aiding *education*—while remaining neutral with respect to its religious or secular orientation—is not the same as aiding *religion*.

A. History Does Not Support Exclusion Of Religious Institutions From Neutral And Generally Applicable Programs Of Aid.

Opponents of educational choice programs frequently invoke the experience in Virginia and other States in rejecting religious assessments as a form of religious establishment. See *Everson* v. *Board of Educ.*, 330 U.S. 1, 28-63 (1947) (Rutledge, J., dissenting) (relying on James Madison's *Memorial and Remonstrance Against Religious Assessments* to argue that the state should not pay for bus transportation to religious schools). To treat the assessment controversy as a parallel to cases such as this, however, is to strain the history beyond recognition. The proposal against which Madison remonstrated was a tax for the specific purpose of subsidizing "teachers of the Christian religion"—*i.e.*, clergymen. The express aim of the proposal was to foster and promote religion in general, and Christianity in particular. See THOMAS J. CURRY, THE FIRST FREEDOMS 136-141 (1986). The funds were earmarked for religious purposes, and their distribution was decidedly non-neutral: churches were the only private institutions to which taxpayers could direct their assessments.[2]

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[2] Assessments paid by taxpayers who preferred not to contribute to any church were paid into the "public Treasury," to be "disposed of under the direction of the General Assembly," for "seminaries of learning." A Bill Establishing a Provision for Teachers of the Christian Religion, *reprinted in Everson*, 330 U.S. at 74 (Supplemental Appendix to dissenting opinion of

By contrast, school choice programs such as that in Cleveland have the secular purpose of enabling poor, mostly minority families to escape failing public schools, and the funds are distributed neutrally, without discrimination for or against religion. There is a profound constitutional difference between funding churches for the purpose of supporting religion, and funding all schools without regard to religion for the purpose of supporting education.

Indeed, there is no historical support for the notion that the Establishment Clause requires the state to discriminate against religious individuals or institutions with respect to generally available public benefits. In this litigation, respondents have not pointed to a single instance during the early days of the Republic in which the legitimacy of public grants to religious institutions for the performance of public functions was even challenged, let alone held to be unconstitutional. And despite careful historical research, we are not aware of one.[3]

Rutledge, J.). Taxpayers did not have the option of directing their assessments to other private institutions of their choice. Indeed, since there were no public schools in Virginia at that time, and education was provided almost exclusively under religious auspices, this meant—ironically—that those who objected to giving their money to churches would be forced to give it to church-related schools. As one scholar has pointed out, "[t]he essence of the general assessment was massive discrimination in favor of religious viewpoints." Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 EMORY L.J. 43, 49 (1997).

[3] Even Thomas Jefferson, as strong a separationist as one can find during the founding period, approved of granting public funds to religious groups for public functions including education. His support for education under religious auspices for Indian tribes is well known. See *Wallace* v. *Jaffree*, 472 U.S. 38, 103 (1985) (Rehnquist, J., dissenting). He took the same position within the States, as can be seen in a letter he wrote to the Ursuline Sisters regarding an orphanage and school they operated in New Orleans:

> Whatever diversity of shades may appear in the religious opinions of our fellow citizens, the charitable objects of your Institution cannot be of indifference to any and its furtherance of the wholesome purpose by training up its young members in the way they should go cannot fail to insure the patronage of the government it is under.

Marie Louise Points, *New Orleans*, in 11 THE CATHOLIC ENCYCLOPEDIA 5, 10 (1911).

When this Court first entertained a challenge to government subsidization of the health and welfare activities of religious organizations, it unanimously found it "wholly immaterial" that the recipient institution—a hospital—was "conducted under the auspices of the Roman Catholic Church," which "exercise[d] great and perhaps controlling influence over the management of the [institution]." *Bradfield* v. *Roberts*, 175 U.S. 291, 298-299 (1899). Since then, church-related groups and institutions providing health, welfare, and educational services (other than elementary and secondary education) have routinely been recipients of governmental aid. See generally STEPHEN V. MONSMA, WHEN SACRED AND SECULAR MIX: RELIGIOUS NONPROFIT ORGANIZATIONS AND PUBLIC MONEY (1996).

The historical record provides no reason to create a special exception for elementary and secondary education. At the time of the framing of the Bill of Rights, there were virtually no state schools.[4] In the early years of the Republic, public support for education generally took the form of grants to private schools, many of which were religious in nature. RICHARD J. GABEL, PUBLIC FUNDS FOR CHURCH AND PRIVATE SCHOOLS 173-262 (1937); BERNARD BAILYN, EDUCATION IN THE FORMING OF AMERICAN SOCIETY (1960). In Washington, D.C., where the Establishment Clause then applied, education was provided entirely through private and semi-public institutions—including denominational schools—partially at public expense until 1848. GABEL, *supra*, at 179. Between 1800 and 1830, New York provided public funds to Presbyterian, Episcopalian, Methodist, Quaker, Dutch Reformed, Baptist, Lutheran, and Jewish schools, to an African Free School, and to the "Free School

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[4] The very term "public school" was frequently used in reference to private schools, including denominational schools. LLOYD P. JORGENSON, THE STATE AND THE NON-PUBLIC SCHOOL, 1825-1925, at 6-7 (1987).

Society," a nonsectarian charitable school that was the forerunner of the public school system. JORGENSON, *supra*, at 14-16; DIANE RAVITCH, THE GREAT SCHOOL WARS: NEW YORK CITY, 1805-1973, at 7, 20-21 (1974); GABEL, *supra*, at 211-213. These arrangements were not challenged, let alone invalidated, as "establishments" under state or federal law.

Only in the second quarter of the 19th Century did the States of the north and west begin to establish public schools with exclusive rights to public subvention. Even then, the defunding of private schools was not based on supposed Establishment Clause problems, but primarily on nativist and anti-Catholic opposition to alternatives to the Protestant public schools. See generally JORGENSON, *supra*; RAVITCH, *supra*. For example, when Catholics sought to participate in New York's pluralistic educational funding system, a bitter political battle broke out, featuring violent anti-Catholic riots. The end result was to confine funding to public schools. RAVITCH, *supra*, at 33-76.[5]

After the Civil War, Congress began appropriating large sums of money to provide schooling for the newly emancipated freedmen of the South. In the same year that it passed the Fourteenth Amendment, Congress enacted a statute instructing the Freedmen's Bureau to work through private benevolent associations whenever the latter provided suitable teachers. Act of July 16, 1866, ch. 200, § 13, 14 Stat. 173, 176. Most of these associations were missionary societies from the North, some nondenominational and some affiliated with particular religious

[5] For additional accounts of the early cooperation between governments and religious schools and the later struggles to defund Catholic schools, see, *e.g.*, CARL F. KAESTLE, PILLARS OF THE REPUBLIC: COMMON SCHOOLS AND AMERICAN SOCIETY, 1780-1860 (1983); CHARLES LESLIE GLENN, THE MYTH OF THE COMMON SCHOOL (1988); STEPHEN MACEDO, DIVERSITY AND DISTRUST 45-87 (2000); Laycock, *supra*, 46 EMORY L.J.at 50-53; Michael W. McConnell, *The New Establishmentarianism*, 75 CHI.-KENT L. REV. 453, 459-461 (2000). John C. Jeffries & James E. Ryan, *A Political History of the Establishment Clause*, __ MICH. L. REV. __ (forthcoming 2002).

denominations. Public funds went to Presbyterian, Methodist, Baptist, Congregationalist, and other religious educational societies. See RONALD E. BUTCHART, NORTHERN SCHOOLS, SOUTHERN BLACKS, AND RECONSTRUCTION: FREEDMEN'S EDUCATION, 1862-1875, at 4-9, 33-52 (1980); WARD M. MCAFEE, RELIGION, RACE, AND RECONSTRUCTION: THE PUBLIC SCHOOLS IN THE POLITICS OF THE 1870s (1998). Thus, at the time the Establishment Clause was applied to the States via the Fourteenth Amendment, it was not understood to bar aid to religious societies for the education of the young.

In the 1870s, Republicans in Congress attempted to amend the Constitution to prohibit aid to "sectarian" schools (while affirming the practice of Bible reading in the "public" schools), but they were unsuccessful. See Joseph P. Viteritti, *Blaine's Wake: School Choice, the First Amendment, and State Constitutional Law*, 21 HARV. J.L. & PUB. POL'Y 657 (1998). Nonetheless, many States adopted "little Blaine amendments," and hostility to Catholic education remained an effective bar to aid to private schooling in most States until after World War II. *Ibid.*; see also John T. McGreevy, *Thinking on One's Own: Catholicism in the American Intellectual Imagination, 1928-1960*, 84 J. AM. HIST. 97 (1997). This is the origin of what the *Mitchell* plurality called a doctrine "born of bigotry." 530 U.S. at 828-829.

More recently, Congress enacted the Elementary and Secondary Education Act of 1965 ("ESEA"),[6] which remains the cornerstone of federal education policy today. The ESEA provides for the "equitable participation" of all students, no matter what kind of school they choose to attend. In this way, the government fosters high quality education for all children—without creating any incentive to seek (or to avoid) religious

[6] Pub. L. No. 89-10, 79 Stat. 55 (1965), reauthorized as Improving America's Schools Act of 1994, Pub. L. No. 103-382, 108 Stat. 3518 (20 U.S.C. § 7301 *et seq.*) (1994).

education, without interfering with the autonomy of the private institutions they attend, and without jeopardizing governmental neutrality toward religion. Such programs foster "pluralism and diversity among [the Nation's] public and nonpublic schools." *Nyquist*, 413 U.S. at 773. From the point of view of American families, genuinely neutral school choice programs unquestionably enhance—and in no way threaten— religious liberty.

In short, the lower court's interpretation of the Establishment Clause cannot be traced to the historical principles that inform it. The Establishment Clause bars coerced taxpayer support for religion as such, but it does not bar taxpayer support for the health, educational, and public welfare activities of religious organizations. Accordingly, when the government provides scholarship funds to individual citizens who are free to use those funds at the religious or secular schools of their choosing, it acts in conformity with this nation's longstanding policy of neutrality—not hostility—toward religion.

B. This Court's Recent Establishment Clause Cases Support The Constitutionality Of Evenhanded School Choice Programs.

In its first encounters with the issue, this Court upheld laws that provided aid on a neutral basis to children attending public and nonpublic schools. *Everson* v. *Board of Educ.*, 330 U.S. 1 (1947); *Board of Educ.* v. *Allen*, 392 U.S. 236 (1968); see also *Cochran* v. *Board of Educ.*, 281 U.S. 370 (1930). For a little more than a decade, however, the Court embraced a reading of the Establishment Clause barring public assistance—even on a neutral basis—to schools in which the religious and secular aspects of education were not kept separate and the aid was not channeled solely to the latter. *Nyquist, supra; Meek* v. *Pittenger*, 421 U.S. 349 (1975); *Wolman* v. *Walter*, 433 U.S.

229 (1977).[7] The court below treated these decisions as controlling.

This jurisprudential era did not last long. Beginning with *Committee for Public Education & Religious Liberty* v. *Regan*, 444 U.S. 646 (1980), and *Mueller* v. *Allen*, 463 U.S. 388 (1983), this Court issued a line of decisions inconsistent with the fundamental assumptions upon which *Nyquist*, *Meek*, and *Wolman* rested.

Ultimately, in *Witters* v. *Washington Department of Services for the Blind*, 474 U.S. 481 (1986), the Court made a decisive break with the *Nyquist* interpretation. The Court unanimously held that the Establishment Clause does not forbid a State to issue a tuition grant to an individual who uses that grant to attend a Bible college for training in the ministry, pursuant to a program of vocational assistance for the blind. Even though the recipient would use the grant to obtain religious education, the Court explained that the grants were "made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited." *Id.* at 487 (citation omitted). In a concurrence gaining the support of five members of the Court, Justice Powell explained that "state programs that are wholly neutral in offering educational assistance to a class defined without reference to religion do not violate the second part of the *Lemon* v. *Kurtzman* test." *Id.* at

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[7] *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), rested on a different rationale. *Lemon* concerned state programs that conditioned public subsidies for the salaries of teachers in religious schools on their agreement not to include religious or moral elements in their teaching. The Court held that enforcing those conditions would constitute an excessive "entanglement" of church and state because they interfered with the schools' autonomy. *Id.* at 608-610. We believe that the Court was correct in ruling that programs structured in that way are unconstitutional—though the constitutional violation, we maintain, was of the free exercise rights of the schools and families, rather than of the Establishment Clause rights of the taxpayer plaintiffs.

490-491 (Powell, J., joined by Burger, C.J., and Rehnquist, J.); see also *id.* at 490 (White, J.); *id.* at 493 (O'Connor, J.).

Post-*Witters* decisions continued in that vein. In *Zobrest* v. *Catalina Foothills School District*, 509 U.S. 1 (1993), the Court held that it is constitutional for the state to provide a sign-language interpreter, on a neutral basis, to a deaf student attending a religious school, even though this would obviously aid the "educational mission" of the school and would entail the communication of religious messages. In *Rosenberger*, the Court held that it is constitutional for a public university to pay the printing costs of a student magazine with religious content, pursuant to a neutral funding program for student publications and other student groups. Indeed, the Court in *Rosenberger* held that it is unconstitutional, under the Free Speech Clause, to deny support to an otherwise eligible group on account of its religious viewpoint. 515 U.S. at 828-837.

In *Agostini* v. *Felton*, 521 U.S. 203, 237 (1997), the Court sustained Title I of the ESEA, a federal program in which public school teachers provide remedial instruction to students attending both public and private schools, overruling prior decisions holding the contrary. Significantly, the Court expressly repudiated the prohibition on "substantial aid to the educational function" of religious schools. See *id.* at 225 ("we have departed from the rule * * * that all government aid that directly aids the educational function of religious schools is invalid"). In place of the *Meek-Wolman* approach, *Agostini* substituted "three primary criteria" to evaluate whether aid-to-education programs unlawfully advance religion: whether the aid is distributed on the basis of "criteria that neither favor nor disfavor religion"; whether the aid is distributed in a form that leads to "government inculcation of religious beliefs"; and whether the aid would "create an excessive entanglement" between church and state. *Id.* at 232-234.

Finally, in *Mitchell* v. *Helms*, 530 U.S. 793 (2000), the Court overruled *Meek* and *Wolman*. *Id.* at 807-811, 829-835 (plurality

opinion); *id.* at 844-845 (O'Connor, J., concurring). There the Court sustained Chapter 2 of the ESEA, a federal program that provides computers, software, books, and other instructional materials for the use of students in public and private schools on a neutral basis. Applying the *Agostini* criteria, a four-Justice plurality held that an aid program is constitutional where it "determines eligibility for aid neutrally, allocates that aid based on the private choices of the parents of schoolchildren, and does not provide aid that has an impermissible content." *Id.* at 829. A concurring opinion by Justice O'Connor, joined by Justice Breyer, relied on a somewhat narrower view. According to them, neutral aid "provided directly to the individual student who, in turn, made the choice of where to put that aid to use" is constitutional without regard to whether it is put to use solely in secular educational settings. *Id.* at 841. Neutral aid provided directly to the religious institution—and not through the medium of a "true private-choice program"—is constitutional unless it is actually put to a religious use. *Id.* at 842.

The *Mitchell* Court did not have occasion to consider the continued vitality of *Nyquist*, but that decision—at least as interpreted by the Sixth Circuit—is plainly inconsistent with both the plurality and the concurrence in *Mitchell*.[8]

C. This Court's Focus On Neutrality And Private Choice Serves The Fundamental Purposes Of The First Amendment.

The two foundations of the Court's recent rulings governing programs of indirect aid to education are the neutral allocation of benefits and the exercise of individual choice. The Court's

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[8] Petitioners offer plausible grounds for distinguishing rather than overruling *Nyquist*, but we believe it would be clearer and more helpful simply to overrule that decision, and any other decisions inconsistent with the *Agostini* criteria. This would allow lower courts to decide cases in accordance with the Court's current doctrine, rather than looking for factual similarities to past cases based on repudiated logic.

focus on neutrality and individual choice serves a number of interrelated constitutional purposes. First, it maintains the distinction between *governmental* promotion of religion, which the Constitution forbids, and *private* religious decisionmaking, which the Constitution protects. State programs that are wholly neutral in offering educational aid to a class defined without reference to religion do not violate the Establishment Clause, because any aid to religion results from "genuinely independent and private choices" of individuals and cannot be attributed to the state. *Witters*, 474 U.S. at 487; see *Mueller*, 463 U.S. at 398-399; *Zobrest*, 509 U.S. at 10; *Agostini*, 521 U.S. at 226, 230-231; *Mitchell*, 530 U.S. at 841 (O'Connor, J., concurring).

Second, when aid is provided on an evenhanded basis to all parents, it avoids creating any "financial incentive" to choose religious schooling or to "modify their religious beliefs or practices in order to obtain those services." *Agostini*, 521 U.S. at 231-232; see *Mitchell*, 530 U.S. at 845 (O'Connor, J., concurring); *Zobrest*, 509 U.S. at 10; *Witters*, 474 U.S. at 488. In this way, the Establishment Clause serves as a guarantor of the freedom of religious choice. The financial muscle of the state must not be used to encourage or discourage religious decisions. See Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 1001-1002 (1990); Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 168-169 (1992). Families should be able to choose religious or secular education for their children on the basis of their conscience and convictions, not because the government is funding one and not the other alternative.

Third, when benefits are distributed among a wide array of beneficiaries on the basis of neutral and objective criteria, there is no implied "endorsement" of religion or "symbolic union" between religion and the state. *Widmar* v. *Vincent*, 454 U.S. 263, 274 (1981); *Witters*, 474 U.S. at 488-489. See *Mitchell*, 530 U.S. at 842-843 (O'Connor, J., concurring). Evenhanded

treatment conveys no message of preferred status. See Eugene Volokh, *Equal Treatment Is Not Establishment*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 341, 357 (1999) ("People know that the government doesn't necessarily endorse private choices that people make with government funds, any more than it endorses cabbage by letting people use food stamps to buy the food of their choice, which may include cabbage").

Contrary to the holding below, therefore, "true private-choice programs" that allocate aid to education on the basis of neutral criteria, leaving the choice of schools to families, are constitutional. It is of no constitutional significance that the program "contains no 'effective means of guaranteeing that the state aid derived from public funds will be used exclusively for secular, neutral, and nonideological purposes,'" as the Sixth Circuit erroneously held. 234 F.3d at 958 (quoting *Nyquist*, 413 U.S. at 780). That is no longer a legal requirement, as the holdings of *Mueller*, *Witters*, *Zobrest*, and *Rosenberger*, and the plurality and concurring opinions in *Mitchell*, make clear. In the words of the five Justices in *Witters*, "state programs that are wholly neutral in offering educational assistance to a class defined without reference to religion do not violate" the Establishment Clause. 474 U.S. at 490-491. Rejection of that principle would require affirmative discrimination *against* families who make religious choices—a result wholly at odds with this Court's decisions, and with the fundamental premises of the First Amendment.

II. The Ohio Pilot Scholarship Program Satisfies This Court's Criteria Of Neutrality And True Private Choice.

In this section, we address the second fallacy of the decision below: the panel's conclusion that the Program "is designed in a manner calculated to attract religious institutions and chooses the beneficiaries of aid by non-neutral criteria." 234 F.3d at 961. We recognize that, under *Lemon* and *Agostini*, there are several criteria that must be satisfied in addition to neutrality

and choice. The programs must serve some secular purpose; they must not foster excessive entanglement; and they must not entail governmental indoctrination. Neither the respondents nor the Sixth Circuit, however, questioned that the Ohio Program satisfies these requirements.[9] We will therefore confine our attention to the one alleged constitutional flaw identified by the Sixth Circuit: the supposed lack of neutrality.[10]

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[9] While the court below at one point asserted that the Program constituted an impermissible "entanglement" (see 234 F.3d at 960), this does not appear to have been intended to mean that the Program violated the entanglement "prong" of *Lemon* (see 403 U.S. at 612-613), as modified and incorporated into *Agostini*'s "primary effect" inquiry (see 521 U.S. at 234). Rather, the court was simply expressing its conclusion that the Program impermissibly promotes private religious schools.

Nor can it be argued that the Program at issue "result[s] in governmental indoctrination." *Agostini*, 521 U.S. at 234. As Justice O'Connor explained in her concurrence in *Mitchell*, "when government aid supports a school's religious mission only because of independent decisions made by numerous individuals to guide their secular aid to that school, '[n]o reasonable observer is likely to draw from the facts * * * an inference that the State itself is endorsing a religious practice or belief.' Rather, endorsement of the religious message is reasonably attributed to the individuals who select the path of the aid." 530 U.S. at 843 (citation omitted).

[10] We note that the form of the aid provided by the Ohio Program is *indirect* —in Justice O'Connor's terminology, it is a "true private-choice program." *Mitchell*, 530 U.S. at 842 (concurring opinion). The Sixth Circuit described the Program as one in which "parents receive government funds, either in direct payment for private school tuition or as a reimbursement for the same." 234 F.3d at 958. Thus, this case does not raise the issue that divided the plurality and the concurrence in *Mitchell*: the rules applicable to per-capita aid programs that are "direct" in form. Compare 530 U.S. at 815-820 (plurality opinion) with *id.* at 842-844 (O'Connor, J., concurring). The funds here flow directly to parents, not schools.

A. The Ohio Pilot Scholarship Program Is Entirely Neutral Between Secular and Religious Schools, Leaving The Choice Of Schools To Individual Families.

The Sixth Circuit acknowledged that the Ohio Program is "facial[ly] neutral[]." 234 F.3d at 959. It distributes tuition vouchers according to strictly secular criteria and "does not * * * define its recipients by reference to religion." *Agostini*, 521 U.S. at 234. Scholarships are awarded solely on the basis of family income, without regard to the religious-nonreligious or public-nonpublic nature of the school each family chooses. 234 F.3d at 948. Parents may select any participating private school within the district—in addition to ordinary public schools, magnet schools, and public charter schools (known in Ohio as "community schools").[11] Any accredited private school willing to comply with the neutral terms of the Program is free to participate.[12] These are entirely neutral and objective bases for allocating resources, and public officials possess no discretion to favor or disfavor religion.[13] Consequently, the

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[11] The statute authorizes Pilot Scholarship students to attend public schools in neighboring districts; such schools would receive a total of $6,544 per student. Ohio Rev. Code § 3317.03(I)(1). Unfortunately, thus far no such districts have been willing to participate. Our defense of the Program does not depend upon the theoretical availability of these schools.

[12] Schools must agree not to charge scholarship students any more than the scholarship amount for tuition, and to select students randomly. If more children apply for the Program than there are spaces, the schools must select students by a lottery with a preference for economically disadvantaged children. Ohio Rev. Code §§ 3313.976(A)(8), 3313.977(A). In the first year, only grades K-3 were eligible, expanding by one grade each year. These are obviously neutral criteria.

[13] The Program must therefore be distinguished from programs such as the Adolescent Family Life Act, 42 U.S.C. § 300z *et seq.*, upheld in *Bowen* v. *Kendrick*, 487 U.S. 589 (1988), where government officials decide which recipients will receive benefits and how much. See *id.* at 596-597 (grants are

allocation of funds among schools is a product of independent private choice, not state decisionmaking.

With respect to this criterion, the Program is constitutionally indistinguishable from Title I, the federal provision that was upheld in *Agostini,* or Chapter 2, the companion provision that was upheld in *Mitchell*. Scholarships are "allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion." *Mitchell*, 530 U.S. at 813 (quoting *Agostini*, 521 U.S. at 231). The benefits are "available to all children * * * , no matter what their religious beliefs or where they go to school." *Id.* at 814 (quoting *Agostini*, 521 U.S. at 232). In neither *Agostini* nor *Mitchell* was the Court troubled by the actual proportion of religious schools that participated, or by the fact that public schools in other districts were not involved. The state aid that is allocated for the benefit of each child eligible to participate in such programs is neither "greater [n]or broader" if students "apply their aid to religious education" than if they attend a public school or a private secular school. *Witters*, 474 U.S. at 488.[14] Such programs "do[] not, therefore, give aid recipients any incentive to modify their religious beliefs or practices in order to obtain those services." *Agostini*, 521 U.S. at 232. Under the Program, Ohio is subsidizing and promoting *education*; it is entirely neutral toward *religion*.

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awarded to applicant organizations based on the Secretary's assessment of their merits under statutory criteria). While discretionary programs are not necessarily unconstitutional as applied to religious grant recipients (see *Kendrick*), they are subject to more stringent controls against the use of funds for religious activities, since any use of the aid to inculcate religion could—unlike here—be attributed to the government.

[14] Although scholarship levels under the Program vary according to the tuition charged by the selected school (see 234 F.3d at 948), this is a neutral criterion that does not express any preference for (or disapproval of) religion, and does not involve the government in religious decisionmaking of any sort. The Program is indistinguishable from *Witters* in this respect.

B. A Substantial Proportion Of Students Attending Religious Schools In One Component Of Ohio's Educational Choice Scheme Does Not Make It Unconstitutional.

The court below erred in concluding that the Program here favors religion. Its view that the Program is "not neutral" because it creates "incentives" favoring religious schools was based primarily on statistical evidence revealing that the majority of schools involved in the Program were religious, and that the majority of students in the Program attended religious schools. 234 F.3d at 959. This is problematic on many levels.

To begin with, this Court has rejected the notion that a facially neutral aid program is unconstitutional because of apparently disproportionate effects. As the Court in *Mueller* explained, it "would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law." 463 U.S. at 401. Accord *Mitchell*, 530 U.S. at 848 (O'Connor, J., concurring) ("We [are] not 'willing to conclude that the constitutionality of an aid program depends on the number of sectarian school students who happen to receive the otherwise neutral aid'" (quoting *Agostini*, 521 U.S. at 229)). The relative numbers of students choosing religious and secular education under the Ohio Program are therefore constitutionally irrelevant.

The validity of neutral public aid to private schools must be measured in terms of neutrality of *opportunity*, not neutrality of *results*. Such an analysis goes beyond a mere statistical snapshot of the existing constellation of participating schools and students. Rather, it asks *what conditions have been created by the government program at issue*. This approach focuses the inquiry on the conduct of the *government*, while leaving private individuals and institutions free to make their own decisions as they see fit. Private citizens, after all, are incapable of violating the Establishment Clause. See *Corporation of Presiding Bishop*

v. *Amos*, 483 U.S. 327, 337 (1987) ("For a law to have forbidden 'effects' under *Lemon*, it must be fair to say that the *government itself* has advanced religion through its own activities and influence."); cf. *Rendell-Baker* v. *Kohn*, 457 U.S. 830 (1982).

Even in terms of results, moreover, it is clear that Ohio has not conferred any advantage on religious schools in Cleveland vis-a-vis their secular counterparts (whether public or private). If anything, religious schools are at a relative *disadvantage*. Families may choose between four types of publicly funded schools: ordinary public schools, "community schools" (more commonly known as charter schools), magnet schools (which, unlike Pilot Scholarship schools, can be selective), and Pilot Scholarship schools. Pupils attending public schools—including magnet schools—receive an average of $7,097 per year in direct aid to their school as well as a $500 subsidy to obtain tutoring from private sources. Students attending "community schools," all of which are secular, receive full tuition of at least $4,518 per year. Students attending Pilot Scholarship schools receive a maximum of $2,500, and the schools they attend may not charge them any additional tuition. It should be obvious that this scheme "creates no financial incentive for students to undertake sectarian education." *Witters*, 474 U.S. at 488; see *Agostini*, 521 U.S. at 232.

When the full range of alternatives is taken into account, the resulting array of schools looks quite different from the portrait painted by the court below. In the 1999-2000 school year, 3,761 students participated in the Program, attending 56 different schools. As the court below found, 46 of those schools, serving about 96 percent of the scholarship students, were religiously affiliated. 234 F.3d at 949.[15] In the same year, 2,087 students

[15] The court below used the adjective "sectarian." According to FUNK & WAGNALLS NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 1137 (comp. ed. 1987), "sectarian" means "[p]ertaining to a sect; bigoted," and "sectarianism" means "excessive devotion to or zeal for a particular sect." See generally Richard A. Baer, *The Supreme Court's Discriminatory Use of the Term "Sectarian,"* 6 J.L. & POL. 449 (1990). We urge the Court to use the more neutral term, "religious" school, instead.

attended "community schools" at state expense. All of these are perforce secular. An additional 16,814 went to magnet schools. C.A. App. 428-429. The remainder attended ordinary public schools. That is an impressive array of choice.[16] Examining the system "as a whole," there is no way to say that educational opportunities in Cleveland are "skewed towards religion." *Witters*, 474 U.S. at 487-488.

It is particularly important to take account of the interplay between the "community school" and the Pilot Scholarship components of the Cleveland system. As the record shows, community schools "operate as direct competitors of the private schools participating in the Scholarship Program." J.A. 59a-60a. The basic concept of a community school is to allow teachers, parents, or community groups to form and control a school, free from the usual bureaucratic and programmatic controls imposed on public schools. See Ohio Rev. Code ch. 3314; *id.* § 3314.04 ("community school[s]" are "exempt from all state laws and rules pertaining to schools, school districts, and boards of education, except those laws and rules that grant certain rights to parents"). From the perspective of a non-profit institution operating a school, these programs provide largely equivalent sources of support, except in two key respects: community schools must be secular, and community schools receive twice as much money per pupil. It is no wonder that most private secular schools that might otherwise participate in the Pilot Scholarship program have become community schools instead. See 234 F.3d at 959 (noting that "there is incentive for private nonsectarian schools to participate in the community

[16] The range would be even more impressive if the neighboring public school systems would agree to participate—but even without them, the system easily satisfies constitutional standards.

schools program rather than in the school voucher program"). As the court below observed (*id.* at 949), earlier in the history of the programs, before the creation of community schools, nonreligious private schools attracted 22 percent of the Pilot Scholarship students. It would be perverse to ignore the financial incentive favoring community schools when evaluating the neutrality of the Cleveland system.

Moreover, it would be short-sighted to base a constitutional conclusion on statistics that reflect only the *present* array of participating schools. School choice is experimental, and is in its infancy as a movement. For a variety of social, cultural, and historical reasons, the vast majority of low-cost private schools in America's inner cities—in the past—have been religious. These have been the only schools with the necessary resources and the dedication to commit those resources to needy children.

Once new funding sources are available, however, there is every reason to expect more schools with different approaches to open. The experience of the Milwaukee Parental Choice Program ("MPCP") is a case in point. Beginning in 1994, when the MPCP was expanded to include religious schools, the number of private *secular* schools participating in the MPCP more than tripled—from seven schools in 1990 to 23 schools in 1998, serving 30% of the choice students. See John F. Witte et al., *Fifth Year Report: Milwaukee Parental Choice Program*, Table I, Department of Political Science and Robert M. La Follette Institute of Public Affairs, University of Wisconsin-Madison (Dec. 1995); Wisconsin Legislative Audit Bureau, *An Evaluation—Milwaukee Parental Choice Program* 27 (Feb. 2000). Moreover, school choice has led to improvements in the traditional public school system. See Catherine Minter Hoxby, *Does Competition Among Public Schools Benefit Students and Taxpayers?*, National Bureau of Economic Research Working Paper No. 4979 (1994); David Osborne, *Healthy Competition*, THE NEW REPUBLIC, Oct. 4, 1999, at 31 (collecting studies showing that competition from charter schools has forced

regular public schools to reform). By fostering more diversity and more competition, school choice programs should thus invigorate nearly every aspect of the American educational status quo. It is particularly ironic to conclude, as did the Sixth Circuit, that a high percentage of religious schools participating in school voucher programs shows that such programs are somehow biased in favor of those schools. Just the opposite is likely to be true.

The court below failed to take account of the full array of choices available to—and used by—low-income families in Cleveland. The court explicitly confined its review to the Pilot Scholarship schools alone, disregarding the other available, government-funded choices. See 234 F.3d at 958 ("Defendants' argument concerning other options available to Cleveland parents such as the Community Schools is at best irrelevant. Analyzing the scholarship program choices as compared to choices or schools outside the program is asking this Court to examine the entire context of Ohio education. Such a question is not before this Court"). In particular, the court refused to take account of the community school program because it is codified in a different part of the Ohio code:

> Defendants asserted repeatedly that the Community Schools program should be considered coterminous with the voucher program, arguing that the programs are merely separate sections in the statute. However, the statutory record does not support this argument, except for perhaps the literal meaning that the two programs do indeed occupy separate sections in the Ohio Code. The school voucher program is enacted as a complete program in the Ohio Revised Code. The program is enacted as a part of the chapter on Boards of Education. Furthermore, the school voucher program, and only the school voucher program, was challenged by Plaintiffs in this lawsuit.

Ibid. (citations omitted). Furthermore, the court observed that if it took programs like the community schools into account, it

"would open the door to a wide-reaching analysis which would permit us to consider any and all scholarship programs available to children who qualify for the school voucher program: we would be considering and comparing every available option for Cleveland children." *Ibid.*

That approach is directly at odds with settled law. This Court has repeatedly held that so long as an aid program "includes all schoolchildren, those in public as well as those in private schools, it is of no constitutional significance whether the general program is codified in one statute or two." *Meek*, 421 U.S. at 360 n.8; *Nyquist*, 413 U.S. at 782 n.38. As Justice Powell stated in *Witters*, the "appropriate perspective" when examining the effect of public aid to those attending religious institutions is to "look[] to the nature and consequences of the program viewed *as a whole*." 474 U.S. at 492.

To base a decision about the constitutionality of a program on whether it is codified in one place or two is utterly formalistic. The Ohio legislature could reenact the Program, integrating the Pilot Scholarship and Community Schools aspects of the choice program into a single statute, and this would not change a thing. From the point of view of participating families—*which is what matters for constitutional purposes*—the question is what choices are available, not what part of the statute books they are in. The underlying constitutional value is to ensure that decisions about education are a product of individual decisions. To evaluate the choices available to families, it is precisely the job of reviewing courts to conduct a "wide-reaching analysis" encompassing "every available option for Cleveland children." 234 F.3d at 958.

When one examines all available publicly funded options—magnet schools, community schools, Pilot Scholarship religious schools, Pilot Scholarship secular schools, and ordinary public schools—it is evident that Cleveland's low-income families have a broad range of options, and that the challenged statute merely expands their freedom to choose.

C. The Court Of Appeals Was Wrong In Concluding That The Ohio Program Was Designed To Discourage Nonreligious Schools From Participating.

Beyond its focus on results rather than opportunities and its inexplicable refusal to consider Cleveland's educational choices "as a whole," the court below offered several reasons for inferring that the Program "discourages the participation by schools not funded by religious institutions." 234 F.3d at 959; see also *id.* at 961 (stating that "the Ohio scholarship program is designed in a manner calculated to attract religious institutions"). These reasons do not withstand scrutiny.

First, the court stated that "[p]ractically speaking, the tuition restrictions mandated by the statute limit the ability of nonsectarian schools to participate in the program, as religious schools often have lower overhead costs, supplemental income from private donations, and consequently lower tuition needs." 234 F.3d at 959. This is like saying that competitive bidding for construction contracts is biased because the firms with lower costs have an advantage. Precisely the same restrictions apply to religious as to secular schools. The government's obligation is to be neutral between religious and secular alternatives. Surely it would be unconstitutional to provide a lesser amount to a religious school on the basis of the generalization that religious schools are lower-cost providers. Private groups that give of their own resources to assist low-income students in obtaining a better education should be applauded, not criticized.

Not only is the panel's argument illogical; it is contrary to precedent. If it is unconstitutional to treat religious schools neutrally because of their alleged lower-cost structure, *Mueller*, *Zobrest*, *Agostini*, and *Mitchell*—as well as *Everson* and *Allen*—were all wrongly decided. It just as easily could have been said in those cases that religious schools had a cost-based advantage. Nor is it suspicious if the $2,500 maximum scholarship level approximates the tuition levels at Cleveland's religious schools. 234 F.3d at 959. At present, those schools

constitute the large majority of low-cost schools in Cleveland. If the maximum level had been higher, respondents would be complaining that religious schools were getting a bonus.

Second, the court stated that "there is incentive for private nonsectarian schools to participate in the community schools program rather than in the school voucher program." 234 F.3d at 959.[17] This is evidently a reference to the fact that community schools receive twice the per-pupil subsidy given to students at Pilot Scholarship schools. Since only secular schools can be community schools, however, the higher subsidy places religious schools at a *disadvantage* relative to their secular counterparts. The Sixth Circuit viewed this aspect of the Program as "discourag[ing] the participation by schools not funded by religious institutions." *Ibid.* That is like saying that the government discourages veterans from taking part in Medicare by offering them higher-quality care at veterans hospitals.

Third, the court pointed to the fact that the programs do not create a sufficient incentive for neighboring public school systems to participate. 234 F.3d at 959. We agree. The program would provide *even more* choices for Cleveland's low-income families if it did. But that does not make the existing range of choices unconstitutional.

Fourth, the court complained that the Program creates no incentives for attending "schools outside of the program":

> Students may not choose to attend community or magnet schools using a voucher, they may not apply a voucher to tuition at a private school outside the Cleveland School District, and they may not receive a voucher for a private school within the Cleveland School District which has not registered as part of the program. Rather, the program provides financial assistance for those parents who wish to

[17] The Sixth Circuit describes this as an "admission" by the Defendants, but it is a point in their favor.

> place their children in the particular private schools, mostly religious, which take part in the program. We find such a scheme directly akin to *Nyquist*'s offensive aid to only private school students.

234 F.3d at 959-960. Let us take this one point at a time.

"Students may not choose to attend community or magnet schools using a voucher." True. But they attend those schools with much *more* state money—$4,518 for community schools and $7,097 (plus $500 for private tutors) at magnet schools. J.A. 56a. Who could possibly say that such a program singles out parents attending religious schools for a "special benefit"?

"[Students] may not apply a voucher to tuition at a private school outside the Cleveland School District." True again. Perhaps it would be wise to expand the Program. But since the private schools outside the district would be subject to precisely the same constitutional objections as those within it, how could that possibly cure the alleged constitutional problem?

"[Students] may not receive a voucher for a private school within the Cleveland School District which has not registered as part of the program." True a third time. But the validity of a program does not turn on whether private schools *choose* to participate. The program in *Mitchell* was not invalid because some private schools in Jefferson Parish declined to participate, and no one would say that the government may *compel* private schools to take part in school choice programs. Are Pell Grants invalid because some private schools do not accept them?

These arguments fall considerably short of demonstrating that the Program was "designed" to favor religious schools.

Fifth, the court claimed that "[c]ontrary to the tax deduction generally available in *Mueller*, the Ohio voucher program is available to curtail only those expenses which students attending certain private schools accrue." 234 F.3d at 960. This is but a restatement of the court's refusal to view the school

choice system *as a whole*. Ohio's Program defrays all the costs of attending public schools (including an extra $500 for private tutoring), and it provides twice the level of scholarship funding to community schools as it does to Pilot Scholarship schools. Only by formalistically focusing on *one component* of the system can the court reach such a counterintuitive conclusion.[18]

Once these misleading arguments are discarded, it becomes clear that the Ohio Program easily satisfies the only disputed *Agostini* criterion: the aid is "allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis." 521 U.S. at 231.

III. The Decision Below Creates Needless Conflict Between The Establishment Clause And The Rest Of The First Amendment.

A final reason to reject the Sixth Circuit's construction of the Establishment Clause is that it would compel discrimination against students on the basis of the religious teaching at the school of their choice. According to the decision below, the state may not defray the cost of an education—however effective it may be in objective educational terms—absent an

[18] This part of the Sixth Circuit's decision is reminiscent of footnote 38 in *Nyquist*, 413 U.S. at 782 n.38:

> We do not agree with the suggestion * * * that tuition grants are an * * * endeavor to provide comparable benefits to all parents of schoolchildren whether enrolled in public or nonpublic schools. The grants to parents of private schoolchildren are given in addition to the right that they have to send their children to public schools "totally at state expense."

It would have been more accurate to say that all parents were given exactly the same set of options: they could either enroll their children in public schools, in which case the government would pay the entire cost, or enroll them in private schools, in which case the government would provide a modest subvention. Neither group was given any rights "in addition" to those given the other. Of course, the subsidy provided for nonpublic schools was but a small fraction of that provided for public schools.

"effective means of guaranteeing that the state aid derived from public funds w[ould] be used exclusively for secular, neutral, and nonideological purposes." 234 F.3d at 958 (quoting *Nyquist*, 413 U.S. at 780). In practical terms, this means that the state must discriminate against otherwise eligible schools on the basis of the religious content of their teaching.

In addition to the difficulties discussed above, this view is at odds with the fundamental logic of the Free Exercise Clause, which prohibits discrimination on the basis of religion. *Church of Lukumi Babalu Aye* v. *City of Hialeah*, 508 U.S. 520, 532 (1993) ("[a]t a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs"); *Employment Div.* v. *Smith*, 494 U.S. 872, 877 (1990) (under the Free Exercise Clause, the state may not "impose special disabilities on the basis of religious views or religious status"); *Hobbie* v. *Unemployment Appeals Comm'n*, 480 U.S. 136, 148 (1987) (Stevens, J., concurring) (the Free Exercise Clause "protect[s] religious observers against unequal treatment"). To deny a generally available benefit to someone on the basis of her religious exercise is presumptively unconstitutional—the equivalent of imposing a fine for engaging in the religious practice. See *Thomas* v. *Review Bd.*, 450 U.S. 707, 720 (1981); *Sherbert* v. *Verner*, 374 U.S. 398, 404 (1963). Thus, the Sixth Circuit created serious constitutional problems where none need exist.

To make matters worse, the Sixth Circuit's approach also raises grave constitutional doubts under the Free Speech Clause. The religious activity that takes place in religious schools is, after all, speech. Teaching is quintessentially speech. And the state may not exclude individuals or groups from the benefits extended to similarly situated persons on the basis of the religious viewpoint of their speech. *Good News Club* v. *Milford Central School*, 121 S. Ct. 2093, 2099-2102 (2001); *Rosenberger*, 515 U.S. at 830; *Lamb's Chapel* v. *Center Moriches Sch. Dist.*, 508 U.S. 384 (1993); *Widmar*, *supra*.

In short, the Sixth Circuit's decision puts the Establishment Clause on a collision course with both the Free Exercise Clause and the Free Speech Clause. The decision reflects an especially improbable reading of related provisions of the same Amendment. It makes far more sense to interpret cognate provisions harmoniously and consistently—to require governmental neutrality toward religious exercise and expression.

* * * * *

In the end, the decision below lacks support in the history of the First Amendment, is contrary to the principles of neutrality and independent choice on which this Court's recent Establishment Clause jurisprudence rests, and creates unneeded conflict with the rest of the First Amendment. It would be unfortunate if such a misguided understanding of the Religion Clauses were to stand in the way of a program that represents many children's only hope for escaping from the life of poverty in which they now find themselves.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

MARK R. LEVIN
RICHARD P. HUTCHISON
MICHAEL J. O'NEILL
MYLES A. PERRY
Landmark Legal Foundation
3100 Broadway, Suite 1110
Kansas City, Missouri 64111
(816) 931-5559

STEFFEN N. JOHNSON
Counsel of Record
STEPHEN M. SHAPIRO
ROBERT M. DOW, JR.
DAVID W. FULLER
Mayer, Brown & Platt
190 South La Salle Street
Chicago, Illinois 60603
(312) 782-0600

Counsel for Amicus Curiae

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